(25,361)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916

No. 531

THE CITY OF MITCHELL, APPELLANTS,

vs.

DAKOTA CENTRAL TELEPHONE COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH DAKOTA.

INDEX

AUTHORITIES CITED:

SOUTH DAKOTA

APPELLEES BRIEF

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STATEMENT OF THE CASE.

On May 11, 1898, the city council of the City of Mitchell, S. D., by ordinance, granted to one F. B. Elce, his heirs, associates and assigns, the right to the use of the streets, alleys and public grounds of said city for the erection and maintenance of a telephone system for the term of fifteen years from that date.

Ordinance No. 135. Record page 67.

Thereafter Elce installed and until 1904, operated a local telephone exchange under said Ordinance No. 135.

On March 21, 1904, the city council of the City of Mitchell, by ordinance entitled, "An Ordinance to Grant Permission to the Dakota Central Telephone Lines, (Inc.) their Successors or assigns, the right to Erect Poles and Fixtures, and to String Wires, for the Purpose of Operating Long Distance Telephone Lines, Within and Through the City of Mitchell, South Dakota," granted the "Dakota Central Telephone Lines" (a corporation) of which appellee is the successor, the right and privileges, given to the Dakota Central Telephone Lines, (Inc.) their successors and assigns, to erect

poles, and string wires on any of the streets, alleys and public highways of the City of Mitchell, excepting Main street, Park avenue, Fourth street and Fifth street, and maintain the same for a period of twenty years, from and after the passage and approval of this ordinance, for supplying the citizens of Mitchell, and the public in general, facilities to communicate by long distance telephone or other electrical devices with parties residing near or at a distance from Mitchell, and all such rights to be continued on the conditions herein named.

Ordinance No. 174, Record page 71.

On May 25, 1904, Elce entered an agreement for the sale of said telephone exchange to said Lines Company. The transfer was completed and possession delivered on July 6, 1904.

Record pages 69, 70, and Paragraph VI, page 73.

On June 7, 1904, the city council of the City of Mitchell by ordinance entitled, "An Ordinance to Grant Permission to the Dakota Central Telephone Lines, (Inc.) their Successors or Assigns, the Right to Erect Poles and Fixtures and to String Wires, for the Purpose of Operating a Long Distance Telephone System, Within and Through the City of Mitchell, South Dakota," granted to said Lines Company the right, "and privilege, given to the Dakota Central Telephone Lines (Inc.) their successors or assigns to erect poles, string wires on any of the streets, alleys and public highways of the City of Mitchell, excepting Main, Park avenue, Fourth and Fifth streets, this exception, however, not to prohibit the crossing of Main, Park avenue and Fourth and Fifth streets, at right angles, where it is necessary, and maintain the same for a period of twenty years from and after the passage and approval of this ordinance, for supplying the citizens of Mitchell, and the public in general, facilities to communicate by long distance telephone or other electrical devices with parties residing in, near or at a distance from Mitchell, and all such rights to be continued on the conditions herein named."

Ordinance No. 180, Record page 72.

It will be noticed that the title to Ordinance No. 174, "For the Purpose of Operating Long Distance Telephone Lines," while, the title to Ordinance No. 180, reads, "For the Purpose of Operating a Long Distance Telephone System." Section One of Ordinance No. 174, reads, "For supplying the citizens of Mitchell, and the public in general, facilities to communicate by long distance telephone or other electrical devices with parties residing near or at a distance from Mitchell." Ordinance No. 180, contains the

same words, except, that the word, "IN" is added making the clause read, "With parties residing 'IN', near or at a distance from Mitchell."

It will be noticed further that Ordinance No. 180, grants the right to erect poles and string wires on any of the streets, alleys and public highways of the city except, Main, Park Avenue, Fourth and Fifth streets. Also the City reserves the right to string wires on the telephone poles for fire alarm purposes. Section No. 5, of Ordinance No. 180.

Record page 72.

That in 1903, the Lines Company, had acquired certain telephone lines running into the City of Mitchell theretofore constructed and operated as toll lines by the Dakota Southern Telephone Co.

Record page 73, Paragraph V.

On October 2, 1904, the Dakota Central Telephone Lines Company sold, assigned and transferred to Appellee all its properties, including the exchange and toll lines at Mitchell.

Record page 73, Paragraph VI.

That on or about the 10th day of April, 1907, the City Council of said City of Mitchell duly passed and the Mayor of said City approved a resolution, in words and figures, as follows:

"Be it resolved, by the City Council of the City of Mitchell, South Dakota, that the right is hereby granted to the Dakota Central Telephone Company, their successors or assigns, to place, construct, and maintain through and under the streets, alleys and public grounds of said city all conduits, manholes and cables proper and necessary for supplying to the citizens of said city and the public in general communication by telephone and other improved appliances."

Record page 73, Paragraph VII.

Thereafter Appellee put its wires under ground, erected a fire proof exchange building, and in 1912, installed an automatic telephone exchange representing an investment of at least $110,000.00. See Paragraph X, of Bill of Complaint, Record page 9, and admissions in Paragraph X, of Answer, Record page 24.

On March 17, 1913, the Mayor and City County of the City of Mitchell, in regular session assembled passed, adopted and published an ordinance or resolution terminating the rights of the Appellee to construct, operate and maintain a local telephone exchange in said city from and after May 11, 1913, and requiring Appellee *forthwith on May 11, 1913*, to remove its telephone property from streets, avenues, alleys and public grounds of said city and providing that if Appellee fails, neglects or refuse to comply with the pro-

visions of said ordinance or resolution, the City Council would take such steps as may be necessary to secure the *IMMEDIATE* removal of said poles, wires, cables, fixtures and apparatus from the streets, avenues, alleys and public grounds of the City of Mitchell.

Record page 74, Paragraph IX.

The approval of the mayor is shown at the bottom of page 75 of the record.

In Paragraph XIV, of the bill of complaint, (Record page 12) the passage adoption and publication of the ordinance of March 17, 1913, is alleged, all of which is admitted in Paragraph XIV, of the answer ,(Record page 26).

In Paragraph XV, of the Bill of Complaint, (Record page 15) it is alleged, "That said defendant cause a copy of said resolutions first above set forth in Paragraph XIV, hereof, to be served on the complainant, and now threatens that if complainant does not remove its said lines and exchange from the City of Mitchell, on May 11th, 1913, and cease to operate said telephone exchange and lines on said date said defendant will proceed to remove the poles and wires from the streets and alleys of said city, and further threatens that it will disconnect the telephones of complainant's subscribers in said City by cutting the wires connecting such telephones with complaint's telephone exchange. And your orator alleges that the defendant, the City of Mitchell, will, unless restrained and enjoined by this Honorable Court, proceed to cut down, remove and disconnect the said telephone poles, lines, wires and telephones, and remove the same from the streets and alleys of said city all to the great and irreparable damage of this complainant."

The answer (Paragraph XV, Record page 26) admits the allegations of Paragraph XV of the Bill of Complaint.

In Paragraph XVI, of the Bill of Complaint, (Record page 16) it is alleged, "And your orator further alleges and shows to the Court that the said ordinance or resolution so passed, adopted and published by said city on March 17, 1913, was expressly intended to apply, and does in fact apply to your orator alone, and was passed, adopted and published with a view of permitting, authorizing and directing the officers and agents of said defendant city, under the guise and form of law, to cut down, remove, destroy, and ruin your orator's said telephone lines and exchange so situated within said City, and with a view of preventing, hindering and obstructing your orator in the further enjoyment of the rights and franchies granted your orator by the State of South Dakota, and with a view of obstructing, hindering and interfering with your orator in the transmission of its

interstate business over its said telephone lines in and through said city.

And your orator further shows to the Court that said defendant claiming and pretending that the said ordinance or resolution of March 17, 1913, is a valid and lawful ordinance or resolution and within the powers conferred upon said city by the laws of the State of South Dakota, intend to further enforce the same by preventing your orator from operating, extending or renewing its said telephone lines and exchange within said city and threatens to prevent your orator and its officers, agents and servants from operating, extending and renewing its said telephone lines and exchanges so situated within said city, and thereby involve your orator in a multiplicity of suits."

The answer to this allegation is as follows: "Answering the sixteenth paragraph of said Bill, the defendant denies that plaintiff is vested with any contract of property or franchises which entitle it to the right-of-way for its telephone lines over the streets, alleys and highways of said city, or that plaintiff has in any manner or form secured any consent from said city to construct, maintain or operaate a local telephone exchange in said city other than the consent given in said ordinance numbered 135, and denies that plaintiff has at all times complied fully and faithfully with all of the regulations and requirements of said city relative to the occupancy of said streets and alleyes for such telephone purposes, and denies that said resolution of March 17, 1913, was passed, adopted and published with a view of permitting, authorizing or directing the officers and agents of the defendant to cut down, remove, destroy and ruin its telephone lines and exchange with a view of preventing, hindering, or obstructing plaintiff in the enjoyment of any of its rights acquired under ordinances No. 174 and 180, or otherwise, than as hereinbefore stated." Paragraph XVI, of answer. Record page 27.

In Paragraph XIX of the Bill of Complaint, (Record page 17) it is alleged: "That said ordinance set out in Paragraph XIV, hereof, has the force and effect of a law of the State of South Dakota within the intent and meaning of Section Ten of Article One, of the Constitution of the United States. That said ordinance so construed as a law of the State of South Dakota is a law impairing the obligation of contracts and as such will and does impair the obligation of the contracts arising between the complainant, and the State of South Dakota, and the City of Mitchell, by reason of the granting to the complainant its Charter Rights, including the right to occupy the streets, alleys, highways

and public grounds of the State for telephone purposes, and the consent of the City of Mitchell to the construction of the telephone exchange and lines in the City of Mitchell, and the acceptance of such rights and privileges by complainant and by the construction of said telephone exchange and lines within the City of Mitchell, all to the great and irreparable damage of the complainant."

This allegation is denied by Paragraph XIX, of the Answer. Record page 28.

In Paragraph XX of the Bill of Complaint, (Record page 17) it is alleged: "Your orator further alleges that the value of the telephone exchange and lines situated in the City of Mitchell, consists largely in the labor of installing the poles, wires and other apparatus. That if such telephone exchange and lines are taken down and dismantled, the salvage will be nominal, and the greater part of the value of such exchange, and lines will be destroyed. That to enforce said ordinance of May 17, 1913, and remove or cause to be removed, or to require the complainant to remove its said telephone exchange, lines, poles, and wires from the streets, and alleys of said city, will deprive complainant of its property in said telephone exchange and lines without due process of law, and will amount to a confiscation, thereof, in violation of the Fifth Amendment to the Constitution of the United States."

This allegation is denied by Paragraph XX, of the answer. (Record page 28.)

In Paragraph XXI, of the Bill of Complaint,, (Record page 18), it is alleged: "Your orator further shows to the Court and alleges that the wrongs done and threatened to be done your orator by the defendant as hereinbefore alleged will impair your orator's contract, property, rights and franchises vested in your orator by the State of South Dakota and consented to by the said City of Mitchell, as hereinbefore alleged, and will deprive your orator of such contract, property, rights and franchises, without due process of law, and will obstruct and interfere with your orator in the dispatch and transmission of its said interstate business in violation of the Constitution and laws of the United States and of the Act of Congress regulating interstate commerce."

The answer to this paragraph is as follows, (Paragraph XXI of Answer) page 28 of the Record:

"Answering the twenty-first paragraph of said Bill, the defendant denies that any of the things done or threatened to be done by it will impair any contract between plaintiff and the defendant or any of its property rights

or franchises vested in it by the State of South Dakota and consented to by the defendant, and denies that any rights have become vested in plaintiff by virtue of any of the acts of the defendant herein that will in any manner be impaired by any of the things done or threatened by the defendant, as alleged in said paragraph."

Ordinance No. 180.

The District Court in its decision finds that the words, "Long Distance Telephone or other electrical devices" occurring in Section One of Ordinance No. 180, should be interpreted as follows:

"In my opinion, a fair conclusion from all the evidence in the case as to the meaning of the words 'long distance telephone,' as used in Ordinance 180, is this: a telephone suitable and efficient for long distance use, and capable of being connected with and used in conection with wires running to distant points; and the meaning of said section is, that the telephone company was granted a franchise to furnish facilities of such character as to transmitters, receivers, poles, wires, switching devices and other necessary appliances, that the patrons of the company in the City of Mitchell could at their own homes or places of business communicate with others, whether in the city, near the city, or at a distance from the city. This construction, in my opinion, gives force and effect to all of the words of the grant, and does violence to none of the language therein contained." (Record page 59, Folio 115.)

While there is no asignment of error challenging the finding of the Court as not being supported by the evidence, we call attention to some of the evidence submitted tending to show that, "Long Distance Telephone" was a trade name applied to certain types of telephone instruments. Kempter B. Miller, electrical engineer and author, testified: "As the solid back instrument was brought out, the Chicago Telephone Company, a Bell concern, sometimes replaced the Blake with the solid back, and charged an increased rate, and they were then commonly referred to as long distance instruments. Independent companies would commonly call the new and improved transmitters, long distance instruments. These were usually, if not always of the so-called granular carbon type. It was a common custom among both Bell and independent companies after adopting the more popular granular carbon instruments to herald them as long distance instruments. The manufactures advertised these improved types of telephones as long distant instruments regardless of whether they were to be used for long distance or local service. Record page 111, Folio 210.

T. C. Burns, telephone manufacturer for thirty years and president of American Electric Co., testified: "Most all telephone companies advertised the granular type of transmitter as 'long distance.' This was quite common by companies in opposition to the Bell Company, which company was using to a large extent inferior instruments, and only giving the long distance granular carbon type to a few subscribers at a higher rental, and in many cases we instructed our promoters to advertise the fact that our instruments were the long distance type, and we made this as one of the inducements to grant franchises for local exchanges." Record page 113, Folio, 213.

Arthur Bessey Smith, electrical enginer and author, testifies:

"I am also familiar with some of the trade names by which the independent manufacturers have called their transmitters of the granular carbon type from 1894 to 1904. Some of these were called 'Hunnings' transmitter, others were called 'solid backs,' others, 'granular carbon,' others 'long distance,' 'gold electrode,' 'American Beauty,' and the like. Many of the manufacturers combined the term 'Long Distance' with the other trade designation.

Most of the instruments produced by independent manufactures designated as long distance telephones were efficient for use in long distance, and the transmitter produced by the American Electric Company is fully equal to the other transmitters which have been mentioned. Record page 114, Folio 216.

"BRIEF OF ARGUMENT"

JURISDICTION OF THE DISTRICT COURT.

Judisdiction is to be determined upon the allegations of the Bill of Complaint:

Mayor v. Cooper, 6 Wall. 247.
Railroad v. Mississippi, 102 U. S. 141.
Tennessee v. Davis, 100 U. S. 257, 264.
Omaha Horse Ry. Co. v. Cable Co., 32 Fed. 727.
St. Paul, M. & M. Ry. Co. v. St. Paul & P. Ry. Co., 15 C. C. A. 167.
North Am. Cold Storage Co. v. Chicago, 211 U. S. 306.

Jurisdiction cannot be defeated by an answer or plea so conceived and drawn as to avoid consideration of any Federal question:

St. Paul, M. & M. Ry. Co. v. St. Paul. & N. P. Ry. Co., 15 C. C. A. 167.
Wright v. Nagle, 101 U. S. 791.

Jurisdiction is predicated on two grounds:

First. State law impairing the obligation of a contract.

Second. Taking of property without due process of law.

Appellant challenges the jurisdiction of the District Court on two grounds:

First. That the resolution of March 17, 1913, is not a law of the state.

Second. The decision of the Supreme Court of South Dakota, that a resolution of a city council is not of equal dignity with and does not operate as a repeal of an ordinance enacted by a city council, is conclusive and binding in Federal Courts.

Record page 132.

The first section of the assignment arises the question whether the ordinance or resolution of March 17, 1913, as alleged in the bill of complaint is a law of the state.

The second section of the assignment is frivolous because based entirely on defensive matter and not on matters disclosed by the Bill of Complaint.

The ordinance or resolution of March 17, 1913, was a law of the State impairing the obligation of a contract.

It is alleged in the Bill of Complaint, admitted by the answer and found by the Court that the ordinance or resolution was regularly passed, adopted, approved and published and that it possesses all the attributes of an ordinance.

Record pages 12, 26, 62 and 74.

Appellant has not by any assignment of error, challenged above mentioned findings.

THE ORDINANCE OR RESOLUTION WAS WITHIN THE POWERS OF THE CITY.

"No telephone line shall be constructed within the limits of any village, town or city, without the consent of its local authorities."

Section 3, Art. 10, Constitution of South Dakota.

Sec. 554, Civil Code of South Dakota, grants to the owners of any telephone lines right of way over lands belonging to the state, public grounds, streets, alleys and highways in the state, subject to control of municipal authorities as to what streets, etc., said lines shall run over or across and the place where poles are to be set.

The above provisions of the Constitution and statute have been construed by the Supreme Court of South Dakota, as follows:

"There is hereby granted to the owners of any telegraph or telephone lines operated in this state the right of way over lands and real property belonging to the state,

and the right to use public grounds, streets, alleys and highways in this state, subject to control of the proper municipal authorities as to what grounds, streets, alleys or highways said lines shall run over or across, and the place the poles to support the wires are located. The right of way over real property granted in this act may be acquired in the same manner and by like proceedings as provided for railroad corporations:" Provided, however, that no telephone line shall be constructed within the limits of any city without the consent of its local authorities." Rev. Civ. Code No. 554; Const. S. D., Art. 10, No. 3.

Missouri River Tel. Co. v. City of Mitchell, 22 S. D. 191.

In City of Mitchell v. Dakota Central Tel. Co., 25 S. D. 409, the Supreme Court of South Dakota expressly held that the City of Mitchell had power to grant telephone franchises.

STATUTORY GRANTS OF POWER.

Sec. 1229 of the Political Code of South Dakota, is the statute defining the powers granted to cities. By Subdivisions 7, 8, 9, 10, power is granted to lay out, establish and imrove streets, plant trees on same, regulate the use of the same and prevent and remove obstructions upon same.

Subdivision 60, grants the power to declare what shall constitute a nuisance and to abate the same.

Sec. 2400, Civil Code, provides "The remedies against public nuisance are:

1. Indictment.
2. A civil action; or,
3. Abatement.

Sec. 2403, Civil Code provides, "A public nuisance may be abated by any public body or officer authorized thereto by law." The power of the city to abate a nuisance was upheld in Huron v. Bank of Volga, 8 S. D. 449.

The poles and wires of the telephone exchange were not subject to removal upon the expiration of the franchise, until the city by appropriate action terminated the righs of the company to occupy the streets:

Mutual Union Tel. Co. v. Chicago, 16 Fed. 309.
State v. Central Union Tel. Co., 14 Ohio Cir. Ct. Rep. 273.
Cedar Rapids Water Co. v. Cedar Rapids, 118 Iowa, 234.
Laighton v. Carthage, 175 Fed. 145.
Cleveland Electric Ry. Co. v. Cleveland, 204 U. S. 116.
Wakefield v. Theresa, 109 N. Y. S. 414.

From the foregoing it appears that the resolution of March 17, 1913, was within the powers of the city and related to subject matter within the jurisdiction of the city council.

WHETHER THE CITY LABELED ITS ACTION, *"ORDINANCE" OR RESOLUTION IS IMMATERIAL.*

There is no statute in South Dakota requiring cities to act by ordinance only. Subdivision 81, of section 1228, Pol. Code, confers power on city council, "To pass all Ordinances, Rules and make all Regulations proper or necessary to carry into effect the powers granted to the cities."

We cite the following statutes requiring the city to act in some cases by ordinance, in others by resolutions. Thus showing the lack of uniform requirement.

Political Code, Sections 1376, 1377, 1380, 1381, 1256, 1296, 1301, 1303, 1306, 1307, 1311, 1333, 1340, 1357 and 1398.

That a resolution may have the force and effect of law is clearly recognized by Section 1214 of the Pol. Code, viz.: "No laws, ordinances or resolution having the effect of law for the government of any city or town passed by the legislative body or bodies there of * * * shall go into effect until twenty days after the passage of such law, ordinance or *resolution* and the words law, ordinance or *resolution* used in this article means ordinance, *resolutions*, orders, agreements, contracts, franchises and any measure which it is in the power of the law makers or the electors of any municipality to enact."

Where the resolution is passed with all the formalities of an ordinance, it thereby becomes a legislative act and it is immaterial whether called an ordinance or resolution:

McQuillin Municipal Corporations, Vol. 2, p. 1395.
Alma v. Guaranty Sav. Bank, 8 C. C. A. 564.

The question of jurisdiction was not certified to this Court.

Impairment may be by resolutions:

Northern Pac. Ry. v. Duluth, 208 U. S. 583.
Vicksburg v. Vicksburg Waterworks Co., 202 U. S. 453.
Iron Mountain Railway v. City of Memphis, 37 C. C. A. 410.
A, T. & S. Ry. Co. v. Shawnee, 183 Fed. 85.

Appellant attempts to bring this case within the rule of:

St. Paul Gas Light Co. v. St. Paul, 181 U. S. 142.
Dawson v. Columbia Trust Co., 197 U. S. 178.
Des Moines v. City Ry. Co., 214 U. S. 179.

The case at bar is clearly distinguished from the above cases and comes within the rule of the following cases:

Owensburg v. Cumberlaind Tel. & Tel. Co., 230 U. S. 58.
A. T. & S. F. Ry. v. Shawnee, 183 Fed. 85.
Northern Pac. Ry. Co. v. Duluth, 208 U. S. 583.

WAS THERE A CONTRACT TO BE IMPAIRED.

Ordinance No. 180, (Record page 72) was intended to and does grant a franchise for an exchange. The words occurring in the ordinance, "Long Distance Telephone," related to the telephone instruments and not to the telephone lines. "Long Distance Telephone," was a trade name applied to telephones equipped with an improved type of transmitter. The ordinance provided for the option of long distance telephone or other electrical devices. When the automatic exchange was installed the so-called long distance telephones were abandoned and other electrical devices, *automatic telephones*, were installed.

The changes made in the form of the ordinance No. 180, as compared with ordinance 174, clearly indicates something more than a franchise for toll lines. The provisions for city fire alarm system indicates that a franchise for an exchange was intended.

Vermillion v. N. W. Tel. Ex. Co., 189 Fed. 289.

If a franchise for toll lines was all that was required then Ordinance No. 174, would have been sufficient and there would have been no occasion for enacting ordinance No. 180.

Ordinance No. 174, was enacted in March, 1904. In April, 1904, appellant's assigns entered into a contract for the purchase of the Elce exchange in Mitchell. Ordinance No. 180, was enacted in June, 1904, and the purchase of the exchange was completed in July, 1904. This clearly indicates the purposes for which Ordinance No. 180 was intended.

CITY'S CONSENT.

No particular mode of expressing consent is required either by the Constitution or by statute and consent may be implied.

Telephone Co. v. Mitchell, 22 S. D. 191.

Power to consent to the construction does not confer power of consent of operation and maintenance:

Telephone Co. v. Minneapolis, 86 N. W. 69.
Abbott v. City of Duluth, 104 Fed. 833..
Duluth v. Tel. Co., 87 N. W. 1127.
State v. Flad, 23 Mo. App. 185.
Telephone Co. v. Red Lodge, 76 Pac. 758.
Irvin v. Telephone Co., 37 La. 633.
Hodges v. Western Union, 29 L. R. A. 770.

Farmer & Getz v. Tel. Co., 74 N. E. 1078.
Chamberlain v. Tel. Co., 93 N. W. 596.
Tel. Co. v. Shebovgan, 90 N. W. 441.
State v. Mil. Ind. Tel. Co., 114 N. W. 108.
Pittsburg Appeal, 115 Penn. 4.
State v. Mayor, 49 N. J. Law, 303.

RES JUDICATA.

Appellee is not estopped by the decision in Mitchell v. Dakota Central Tel. Co., 25 S. D. 409, because:

First. The suit is not on the same claim or demand.

Second. The particular point was not involved.

Third. In determining whether there is a contract to be impaired and in interpreting such contract the Federal Courts are not bound by the decisions of the state courts.

On the first two points, we cite:

Russell v. Place, 94 U. S. 606.
Davis v. Brown, 94 U. S. 423.
Carter v. Carter, 103 N. W. 425.

In suits of this kind the Federal Courts exercise an independent judgment as to the existence and proper construction to be placed upon a contract:

Mobile & Ohio Ry. Co. v. Tennessee, 153 U. S. 486.
Mercantile Trust Co. v. City of Columbus, 203 U. S. 311.
Perry Co. v. Norfolk, 220 U. S. 472.
Milwaukee Electric Co. v. R. R. Commissioners, 238 U. S. 174.
State v. Port Royal & A. Ry. Co., 56 Fed. 333.
Owensbora v. Cum. Tel. & Tel. Co., 230 U. S. 58.
Bank v. Stone, 88 Fed. 383.

Testimony of ex-city officials as to what they indended when they enacted the ordinance No. 180, is inadmissible:

City of Vermillion v. N. W. Tel. Ex. Co., 189 Fed. 289.

ARGUMENT AND BRIEF.

We agree with appellant that the issues on this appeal are:

1. The jurisdiction of the United States District Court to hear and determine the matters in controversy.

2. The scope and interpretation to be placed upon Ordinance No. 174 and 180, as heretofore set out.

3. Whether or not the matters in controversy herein is res adjudicata, so as to be binding upon the United States Courts.

Appellant's Brief p. 17.

It will be noticed that the validity and effect of the resolution of March 17, 1913, is not presented, except, as it bears on the question of jurisdiction.

"JURISDICTION."

Appellant by its first assignment of error challenges the jurisdiction of the District Court on two grounds:

First. That the resolution is not a law and did not, and does not have the force and effect of a law of the State, impairing the obligations of a contract.

Second. The Supreme Court of the State of South Dakota, has considered and decided that a resolution of a city council in said state is not of equal dignity with and does not operate as a repeal of an ordinance enacted by a city council and such decision is conclusive of this question and binding on the Federal Courts.

Appellant's Brief pp. 17 and 18.

The jurisdiction of the District Court is to be determined upon the allegations of the bill of Complaint:

> "If, on the face of the complaint or declaration, the case is one which the court has the power to hear and determine, because of the existence of a federal question, it has the right to decide every issue that may subsequently be raised; and whether the decision of the case ultimately turns on a question of federal, local, or general law is a matter that in no wise affects the jurisdiction of the court. Mayor v. Cooper, 6 Wall. 247; Railroad Co. v. Mississippi, 102 U. S. 135, 141; Tennessee v. Davis, 100 U. S. 257, 264; Omaha Horse Ry. Co. v. Cable Tramway Co., 32 Fed. 727." St. Paul, M. & M. Ry. Co. v. St. Paul & N. P. R. Co., 15 C. C. A. 167, 68 Fed. 10.

If jurisdiction is fairly disclosed by the plaintiff's statement of his own cause of action, it cannot be defeated by an answer or plea so conceived and drawn as to avoid the the consideration of any federal question or questions:

> St. P., M. & M. Ry. Co. v. St. Paul & N. R. C., 15 C. C. A. 167, 68 Fed. 9, 10.
>
> Wright v. Nagle, 101 U. S. 791.

In the Bill of Complaint it is claimed that the action complained of and sought to be restrained violated the constitutional law relating to a law of the state impairing the obligation of a contract and taking of property without due process. The district court maintained its jurisdiction on both grounds. Record page 45.

The assignment of error raises only to the question relating to a law impairing the obligation of a contract. The second ground stated in the assignment of error cannot be

considered because it is based upon defensive matter which could not in any event defeat the jurisdiction of the Court.

St. P., M. & M. Ry. Co. v. S. Paul & N. R. Co., 15 C. C. A. 167.

Wright v. Nagle, 101 U. S. 791.

Hence the only question that is presented by the assignment of error is this, Is the resolution of March 17, 1913, a law of the State impairing the obligation of a contract? This question is further presented by the third assignment of error. Record page 136.

In North American Cold Storage Co. v. Chicago, 211 U. S., 306 (Reading from page 314), it is held:

"The Court further held that the allegation that the intention to seize and destroy the poultry without any judicial determination as to the fact of its being unfit for food was in violation of the 14th Amendment could not be sustained; that such amendment did not impair the police power of the state, and that the ordinance was valid, and not in violation of that amendment. The demurrer was therefore sustained and the bill dismissed, as stated by the Court, for want of jurisdiction.

"We think there was jurisdiction, and that it was error for the Court to dismiss the bill on that ground. The Court seems to have proceeded upon the theory that, as the complainant's assertion of jurisdiction was based upon an alleged Federal question which was not well founded, there was no jurisdiction. In this we think that the Court erred. The bill contained a plain averment that the ordinance in question violated the 14th Amendment, because it provided for no notice to the complainant or opportunity for a hearing before the seizure and destruction of the food. A constitutional question was thus presented to the Court, over which it had jurisdiction, and it was bound to decide the same on its merits. If a question of jurisdiction alone were involved, the decree of dismissal would have to be reversed."

Following the doctrine of the above case, the District Court had jurisdiction to decide the question even though the ultimate decision might be in favor of the defendant.

THE RESOLUTION OF MARCH 17, 1913, WAS A LAW OF THE STATE IMPAIRING THE OBLIGATION OF A CONTRACT.

It is alleged in the Bill of Complaint (Record page 12), admitted in answer (Record page 26), stipulated as a fact (Record page 74), and found by the District Court (Record page 62, Folio 120), that the City of Mitchell did, on the 17th day of March, 1913, by its city council in regular ses-

sion assembled, pass, adopt and publish said resolution and that the same was approved by the mayor. The District Court found that the resolution had all the attributes of an ordinance (Record page 62, Folio 120). Appellant has not by any assignment of error challenged that finding either as law or fact.

THE RESOLUTION OR ORDINANCE WAS WITHIN THE DELEGATED POWERS OF THE CITY.

Section Three (3), Article Ten (10) of the Constitution of South Dakota, provides that:

"No telephone line shall be constructed within the limits of any village, town or city, without the consent of its local authorities."

Section 554 of the Civil Code of South Dakota provides as follows :

"There is hereby granted to the owners of any telegraph or telephone lines operated in this state, the right of way over lands and real property belonging to the state, and the right to use public grounds, streets, alleys and highways in this state subject to control of the proper municipal authorities as to what grounds, streets, alleys or highways said lines shall run over or across, and the place the poles to support the wires are located; the right of way over real property granted in this act may be acquired in the same manner and by like proceedings as provided for railroad corporations."

In Missouri River Telephone Co. v. City of Mitchell, 22 S. D. 191, (Reading from page 196), the Supreme Court of South Dakota, has construed these provisions of the Constitution and statutes as follows:

"The argument of appellant's counsel in support of the contention that the facts found by the trial court do not sustain its conclusions of law is founded upon a misapprehension as to the source of the plaintiff's rights. Its franchise was derived from the state, not from the city. It is a corporation created by and existing under state laws. The nature and extent of its rights depend on the will of the Legislature, limited, so far as this case is concerned, only by the provisions of the state Constitution that no telephone line shall be constructed within the limits of any city without the consent of its local authorities. Const. S. D., art. 10, § 3. While this provision limits the power of the state Legislature, it grants no legislative power to the municipal council. Though the Legislature may not authorize the construction of a telephone line in any city without the latter's consent, the city has no power to impose any conditions or establish any regulations other than

those permitted by the Legislature. Adding to the statute the constitutional provision regarding consent, the law applicable to the issue here involved is expressed in the following language: 'There is hereby granted to the owners of any telegraph or telephone lines operated in this state the right of way over lands and real property belonging to the state, and the right to use public grounds, streets, alleys and highways in this state, subject to control of the proper municipal authorities as to what grounds, streets, alleys or highways said lines shall run over or across, and the place the poles to support the wires are located. The right of way over real property granted in this act may be acquired in the same manner and by like proceedings as provided for railroad corporations' Provided, however, that no telephone line shall be constructed within the limits of any city without the consent of its local authorities. Rev. Civ. Code, § 554; Const. S. D. art. 10, § 3.

"Assuming that the local authorities of the defendant city might have arbitrarily refused to admit the plaintiff, if consent to enter the city was given, the plaintiff was subject to municipal control only as to what grounds, streets, alleys, and highways its line should occupy, and as to what place its poles should be located. Consent having been given, the right of the city to control the telephone company results from the statute, and not from the ordinance, resolution, or action of the local authorities by which the consent is manifested; and consent once given cannot be revoked. Appeal of City of Pittsburg, 115 Pa. 4, 7 Atl. 778; State v. Mayor, 49 N. J. Law, 303, 8 Atl. 123. The right of a telephone company to construct its lines anywhere in the state includes the right to enter any city with the consent of its local authorities, and when such consent has been obtained the company is subject only to such rules and regulations as the Legislature may prescribe or authorize the council to prescribe. The right thus conferred upon a telephone company by the state—its franchise—is, of course, subject to control by the Legislature, which is prohibited from making any irrevocable grant of that nature. (Const. S. D. art. 6, § 12.) The Legislature may extend or restrict the powers of cities with respect to these companies as its wisdom may dictate; but no city can impose any conditions or enforce any regulations other than those authorized by the Legislature. And it is fortunate that such is the law; the construction, operation, and management of telephone lines, especially long distance lines, being matters in which all the inhabitants of the state have a constantly increasing interest. So the only issue in this

case is whether the local authorities of the defendant city consented to the construction of plaintiff's line within the city limits."

Again in City of Mitchell v. Dakota Central Telephone Company, 25 S. D. 409, further construing these provisions of the Constitution and statute, that Court said:

"The appellants contend for a reversal of the judgment in this case, 'that the City of Mitchell had full power and authority to pass ordinance No. 135, and to impose upon its consent to the use of its streets for telephone purposes the conditions therein prescribed; that said ordinance No. 135 is valid in every respect and is in full force and effect, and by virtue of its provisions the defendant company is under legal obligation to pay to the plaintiff city the amount prayed for in the complaint herein; that ordinance No. 135, when acted upon, became a valid and binding contract which the defendant is now estopped to deny; that the trial court erred in its conclusions of law No. 1, 2, 4, and 7, and in rendering judgment dismissing plaintiff's complaint and awarding costs to the defendant.' The respondent contends in support of the judgment that the city of Mitchell was without authority to impose the conditions specified in section 4 of ordinance No. 135 relating to the payment of 10 per cent of its gross proceeds in excess of $2,400, and that the provision providing for the payment of the 10 per cent. of the gross proceeds was void. The respondent further contends that ordinance No. 180 passed by the city of Mitchell in 1904 in effect repealed the provisions relating to the 10 per cent. of the gross receipts provided for in section 4 of ordinance No. 135. It will thus be seen that the questions presented are: (1) Did the city of Mitchell have authority to grant to the predecessor of the defendant the right to establish its telephone system in the city of Mitchell upon the condition that it pay to the city 10 per cent. of its gross proceeds over and above the sum specified? (2) Did the subsequent ordinance No. 180, granting to the defendant the right to maintain a long distance telephone system within the city of Mitchell, have the effect of repealing the provisions relating to the payment of the 10 per cent. of its gross proceeds as provided in section 4 of ordinance No. 135?

Section 3, art. 10, of the state Constitution, provides as follows: 'No street passenger railway or telegraph or telephone line shall be constructed within the limits of any village, town or city without the consent of its local authorities.' It is quite apparent from this section of the Constitution that there is reserved to the municipality the

right to grant or refuse to grant to telephone companies the privilege or franchise for establishing a telephone system within the municipality, and that it necessarily follows that if it had the right to refuse to grant such franchise or privilege, it necessarily has the right to grant the same upon such terms and conditions as it may choose to impose, and, if the telephone company accepts the conditions, they become binding upon the company. Such company cannot accept the grant and proceed to install their plant and refuse to comply with the conditions upon which the grant was made.

Section 554 of the Civil Code provides as follows: 'There is hereby granted to the owners of any telegraph or telephone lines operated in this state, the right of way over lands and real property belonging to the state, and the right to use public grounds, streets, alleys and highways in this state subject to control of the proper municipal authorities as to what grounds, streets, alleys or highways said lines shall run over or across, and the place the poles to support the wires are located; the right of way over real property granted in this act may be acquired in the same manner and by like proceedings as provided for railroad corporation.' The latter law does not, in our opinion, have the effect of repealing subdivision 9, 10, and 17 of section 229, Rev. Pol. Code, which confers upon cities the right to control and manage its streets and alleys. Both Codes, having been passed at the same time, must be construed together, and these sections will also be construed with reference to the state Constitution known as section 3 of article 10, which is hereinbefore quoted. Those sections construed together would seem (1) to give the city exclusive right to control its streets and alleys, and (2) the Constitution prohibits the state from passing any law granting to an individual or corporation the right to construct a telephone system or a street railway unless consented to by the municipality. Subject to these rights the state confers upon corporations or individuals the right to construct telegraph and telephone lines over the lands belonging to the state, and gives its consent, subject to the foregoing provisions to the same being constructed within the municipality. If section 554 of the Civil Code was given the effect claimed by the respondent, it would clearly be in conflict with section 3 of article 10 of the state Constitution. It cannot be presumed therefor that by this section of the Civil Code it was intended either to repeal the provisions of the subdivisions referred to in section 1229 of the Revised Political Code, or to pass a

law in conflict with the state Constitution. Conditions prescribed in ordinances granting the privileges or franchise to telephone companies subject to the condition of the payment of a portion of its proceeds as compensation for the use of its streets and alleys for telephone purposes are generally upheld by the Courts. And when the terms are accepted and acted upon, it becomes a contract binding upon the parties, and the party receiving the benefit of the grant is estopped from pleading that the conditions were autra vires."

It will be noticed that while there is an apparent conflict between the two decisions, yet, the Court in the last opinion does not criticize, modify or overrule the former opinion. The second opinion seems to be merely an extension of the matters determined in the first cause. In the first case the Court was dealing with the question as to whether when a city has given its consent such consent can be withdrawn. In the second case the Court was considering the validity and enforcement of a promise made by way of consideration or inducement to the city to give its consent.

As we view these opinions they amount to this: that any consideration, promise or inducement by which the city is induced to give its consent is valid and binding but that after consent has once been given the city cannot subsequently withdraw its consent or impose any new obligation or condition.

STATUTORY GRANTS OF POWER.

Section 1129, Political Code (Revised Codes of 1903, page 207) provides:

"The City Council shall have the following powers:

Subdivision No. 7. To lay out, establish, open, alter, widen, extend, grade, pave or otherwise improve the strets, alleys, avenues, sidewalks, wharves, parks and public grounds, and vacate the same.

Subdivision No. 8. To plant trees on the same.

Subdivision No. 9. To regulate the use of the same.

Subdivision No. 10. To prevent and remove obstructions and encroachments upon the same.

Subdivision No. 60. To declare what shall be a nuisance, and to abate the same, and impose fines upon parties who may create, continue, or suffer nuisances to exist.

The foregoing provisions grant the city full and ample powers. The city is clothed with power to lay out the streets. It is clothed with power to regulate the use of the streets and it is clothed with power to PREVENT AND REMOVE OBSTRUCTIONS AND ENCROACHMENTS UPON THE SAME.

Now if the city is right in its contention that the telephone company had no rights in the streets other than those granted by Ordinance 135, and that all such rights would expire by limitation of time on May 11, 1913, the city by virtue of the mere fact of the expiration of time would not have a legal right to immediately, on the expiration of time, remove the poles and wires from the streets.

Mutual Union Tel. Co. v. Chicago, 16 Fed. 309, 11 Bliss. 539.,

State v. Central Union Tel. Co., 14 Ohio Cir. Ct. Rep. 273.

Cedar Rapids Water Co. v. Cedar Rapids, 118 Iowa, 234, 91 N. W. 1081.

Laighton v. Carthage, 175 Fed. 145-151.

Cleveland Electric Ry. Co. v. Cleveland, 204 U. S. 116.

The reasons are that the company has a reasonable time in which to remove its property and it is entitled to a reasonable time in which to negotiate a renewal of its franchise, or, sell its property to those who may succeed in securing a franchise to continue the business. Further than that the company, may, if the city does not object, continue to perform its duty to the public and is subject to the jurisdiction of the Court to enforce the duty thus impliedly arising.

Laighton v. Carthage, 175 Fed. 145.

Wakefield v. Theresa, 109 N. Y. S. 414, 125 App. Div. 28.

From the above cases it is clear that the mere expiration of time does not in itself necessitate an immediate removal from the streets. There must be something more and that something is affirmative action upon the part of the city denouncing the further occupancy of the streets by the concern whose franchise has expired. That is to say the poles and wires in the street do not become a nuisance and subject to abatement by the mere expiration of the franchise but may become such by the declaration of the city.

Under the state statute above quoted and particularly subdivision 60, of section 1229, Political Code, the city has the power to declare and abate nuisances. In City of Huron v. Bank of Volga, 8 S. D. 449, the Supreme Court of South Dakota, sustained the power of the city to abate nuisances. This was under a city charter which provided that, "The city council shall have power to restrain, prohibit and suppress nuisances at common law."

Section 2400 of the S. D. Civil Code, (1903) reads, "The remedies against a public nuisance are:

1. Indictment.

2. A Civil Action, or,
3. Abatement.

Section 2403. "A public nuisance may be abated by any public body or officer authorized thereto by law." (The above actions are the same as those referred to in Huron v. Bank of Volga, as sections 4688 and 4690 Comp. Laws).

We therefore have this situation: The telephone poles and wires were rightfully in the streets of the city of Mitchell. The city has full power to regulate the use of the streets, to remove obstructions therefrom and to declare and abate nuisances in the street. The Elce franchise would expire by its terms on May 11, 1913. The Telephone Company if it had no franchise rights other than those acquired by it under the Elce ordinance had a right to continue to occupy the streets for a reasonable time after the expiration of the franchise, provided, the city did not by affirmative action declare otherwise.

From this it will be seen that the matters with which the resolution sought to cover were within the power of the city and that the effect of the ordinance was to cut off any period of indulgence after the expiration of the franchise as well as to lay the foundation for abatement by force. It matters little whether the abatement would be based on the power to remove obstructions from the streets or on the power to remove the poles and wires by way of abatement of a nuisance. The resolution of March 17, 1913, was an effective and necessary piece of legislation preliminary to the removal of the poles and wires from the streets on May 11, 1913.

The resolution recites that the rights under Ordinance 135, will expire on May 11, 1913,—that the company refused to accept the terms of a proffered new franchise ordinance; that the company has no other right and then declares, "That the right and privilege of the Dakota Central Telephone Company, to construct, operate and maintain a local telephone system or exchange in the city of Mitchell *be and the same are hereby terminated from and after the 11th day of May, 1913.*"

The resolution then notifies the company to remove its property *forthwith on the 11th day of May, 1913*, and in the event of its failure to do so the city council will take such steps as may be necessary to secure the *immediate removal* of said poles, etc.

The last paragraph legislates as to what shall constitute notice of the contents of the resolution and of the intention of the city. We therefore insist that the resolution was

within the powers delegated to the city and that it was legislative.

THE CITY COUNCIL HAS ACTED WITHIN ITS POWERS AND ITS ACTION IS LEGISLATIVE. Confessedly the action of the city was taken as a challenge and demand of the rights the company was asserting under franchises other than Ordinance No. 135.

Also it must be conceded that if the Company is right in its contention,—that it has rights under Ordinance No. 180,—then, the action of the city impairs the contract created by Ordinance No. 180. *DOES THE LABEL, "RESOLUTION," WHICH THE CITY GIVES ITS ACTION RENDER THE LEGISLATION INVULNERABLE TO THE CONSTITUTIONAL RESTRICTIONS AGAINST LEGISLATION IMPAIRING CONTRACTS.*

1. The assignment of error is based solely upon the proposition that a resolution is not a law of a state within the constitutional inhibition.

2. The argument therefor that this resolution is not broad enough and that it comes within the doctrine of *City of Des Moines v. Des Moines City Railway Company* is outside of the assignment of error and is not covered by it.

3. The real question is not the form of the enactment but is,

(a) the enactment one authorized by the Legislature of the state so that the city is acting under power delegated by the Legislature and so that its act is therefore a law of the state, and

(b) does this law of the state impair the obligation of the contract in question?

If the form of the enactment and not its substance is the material thing, then a limitation is written into the Constitution which is that it protects against impairment of contracts only when that impairment is by virtue of an ordinance but that it does not protect against the same impairment of a contract if the action taken is in the form of a resolution.

If this resolution is valid, then exactly the some consequences will follow as if it were an ordinance, and whether the defendant in error is to be protected will depend not upon whether or not its contract with the city and the state is violated but upon the form which this violation takes.

The essential thing is whether or not this resolution was a legislative act in the same sense that it was the exercise by the city of power delegated to it by the Legislature of the state. If it was such an act, and it impairs this contract, it is void. Otherwise, we have the absurd conclusion that

the contract may be impaired by a resolution, which counsel for the plaintiff in error designates as the inferior enactment, but that it may not be impaired by an ordinance, which is the superior enactment.

Assume for the sake of the argument that the resolution of March 17th had been in form an ordinance. Would this ordinance have been an impairment of the contract?

This is not denied. It is not argued or contended that if this had been in the form of an ordinance it would not have been in violation of the contract under Ordinance No. 180, if our construction of Ordinance No. 180 is right.

Conceding this proposition, the remaining proposition is, does the form of the enactment constitute the essential feature or is the essential thing the fact that it violates the contract?

The so-called resolution is sufficient to constitute it a law of the state.

Appellant makes the point that the city could not legislate by resolution.

Subdivision No. 81, of Section 1229, Political Code (Being the statute granting power to the cities), "To pass all *ORDINANCES, RULES*, and make all *REGULATIONS* proper or necessary to carry into effect the powers granted to the cities."

The statutes relating to the matter of legislation by cities are the following:

§ 1376. "Any city may so extend its boundaries as to increase the territory within its corporate limits, not to exceed in any one year one-fourth the area, by a resolution of the city council passed by two-thirds of the entire council-elect, particularly describing the land proposed to be included within the city limits, setting forth boundaries, and describing the lands platted by blocks and lots.

§ 1377. "The resolution of the city council shall be published in the official paper in the city for three consecutive weeks and unless a written protest, signed by a majority of the property owners of said property extension, be filed with the city auditor within ten days after the last publication of such resolution the territory described in the resolution shall be included within and become a part of the corporation of the city, but in case of the filing of such protest, no further proceedings shall be had under the preceding section.

§ 1380. "When by this chapter the power is conferred upon the city council to do and perform any act or thing, and the manner of exercising the same is not specifically

pointed out, the city council may provide by ordinance the details necessary for the full exercise of such power."

§ 1381. "The duties, powers and privileges of all officers of any character, in any way connected with the city government, not herein defined, and the defining by this chapter of the duties of the city officers, shall not preclude the city council from defining by ordinance further and additional duties to be performed by any such officers."

§ 1256. The city council shall by ordinance fix and determine the amount of the salaries and compensation of all city officials, and the time the same shall be paid; provided, that in all cities of the first class the mayor and city treasurer shall each receive a salary of six hundred dollars per annum, the city auditor, city attorney and city assessor shall each receive a salary of one thousand dollars per annum, payable in equal monthly installments."

§ 1296. "The city council shall at their regular meeting in Septembtr of each year, or within ten days thereafter, pass an ordinance to be termed the annual appropriation bill, in which such corporate authorities may appropriate such sum or sums of money as may be deemed necessary to defray all necessary expenses and liabilities of such corporation; and in such ordinance shall specify the objects and purposes for which such appropriations are made, and the amount appropriated for each object or purpose. No further appropriation shall be made at any other time within such fiscal year unless the proposition to make each appropriation has been first sanctioned by a majority of the legal voters of such city, either by a petition signed by them or at a general or special election duly called for that purpose."

§ 1301. "No public grounds, streets or alleys, or part thereof within the city, shall be vacated or discontinued by the city council except upon a petition of the majority of the owners of the property on the line of such public grounds, streets or alleys resident within the city. Such petition shall set forth the facts and reasons for such vacation, accompanied by a plat of such public grounds, streets or alleys proposed to be vacated, and shall be verified by the oath of at least two of the petitioners, and the consent in writing of all the owners of the property adjoining the plat to be so vacated. The city council thereupon shall, if they deem it expedient that the matter should be proceeded with, order the petition to be filed with the city auditor, who shall give notice by publication in the official newspaper of the city for four weeks at least once in each week, to the effect that such petition has been

filed as aforesaid and stating in brief its object, and that said petition will be heard, and considered by the council, or a committee of them, on a certain day therein specified, not less than ten days from the expiration of such publication. The city council, or such committee as may be apointed by them for the purpose, at the time and place appointed, shall investigate and consider the matter, and shall hear the evidence and testimony of the parties interested. The city council, thereupon, after hearing the same or upon the report of such committee favoring the granting of such petition, may, by resolution passed by a two-thirds vote of all the members-elect to declare such public grounds, streets, alleys or highways vacated; which said resolution, before the same shall go into effect, shall be published as in the case of ordinances, and thereupon a transcript of such resolution duly certified by the city auditor shall be filed for record and duly recorded in the office of the register of deeds of the county. Any party aggrieved thereby may, within twenty days after the publication of such resolution appeal to the court of the county, under the same regulations as in the case of opening streets and alleys, and the judgfent of the court therein shall be final, * * *"

§ 1303. "When the city council shall deem it necessary to open, widen, extend, grade, pave, macadamize, bridge, construct a viaduct, curb, gutter, drain, lay or extend its water mains, or otherwise improve any street, alley, lane, avenue, or highway, or other public grounds, within the city limits for which a special assessment is to be levied as herein provided, the city council shall by *resolution* declare such work or improvement necessary to be done, and such *resolution* shall be published for four successive weeks, etc. * * *"

§ 1306. "The city council may by ordinance establish the grade of all streets, alleys and sidewalks in the city, as the convenience of the inhabitants may require, and a record of the same shall be kept, together with the profile thereof, in the office of the city engineer. Provided, that after the grade of any street has been established as provided by law the city shall, if they change the grade, be liable to the abutting property owners for any damage they may sustain by reason of any permanent improvements having been made in conformity to the grade as first established."

§ 1307. "The council shall by ordinance prescribe the width of sidewalks, and may establish different widths in different locations, and determine the kind of material of

which they shall be constructed, having regard to the business and amount of travel in the vicinity of each, and to provide by ordinance for the letting of contracts for building the same."

§ 1311. "The city council may provide by ordinance for repairing sidewalks where the amount of repairs does not exceed the sum of ten dollars for fifty feet of such sidewalk, and may pay for the same out of the general fund if they shall deem it expedient."

§ 1333. "Whenever the city council of any city shall deem it necessary to grade, pave or macadamize any street, avenue or alley, and have taken all the steps prescribed in the preceding article in relation thereto, and so provided by an ordinance passed by two-thirds of all the aldermanelect, they may divide the amount of the special assessment therefor into installments, the first of which shall not exceed twenty per cent. of the total of said assessment, which shall be due and payable from and after the filing of the assessment roll with the city treasurer."

§ 1340. "Whenever any city council shall deem it necessary to appropriate or damage any private property for the purpose of establishing, opening, widening or extending any street, highway or alley in such city, or for the purpose of making any other public improvement or to acquire or damage private property for any public use, the said council shall, by resolution passed by two-thirds majority of all the members-elect, declare such appropriation necessary to be made, stating the purpose therefor and the extent of such appropriation, and thereupon the proceedings for such condemnation and appropriation shall be had as provided in Chapter 40 of the Code of Civil Procedure."

§ 1357. "Whenever the city council of any city which shall have adopted plans for sewerage as herein provided, shall deem it necessary to construct any sewer or sewers, the city council shall by resolution declare the necessity therefor, which resolution shall state the location of such sewer or sewers and designate all terminal points thereof. The city council shall couse such resolution, etc. * * *"

§ 1398. "Whenever any city of the third class shall desire to loan or invest any sinking fund, or any part thereof, the city council of said city shall pass a resolution declaring that it is for the best interest of said city that the sinking fund, or a part thereof, shall be invested or loaned, also stating the kind or kinds of securities in which such fund or part thereof shall be loaned or invested and said resolution shall be published for three successive

weeks in the official newspaper of said city, and at the expiration of such publication the said city council shall again vote on the resolution and if it receive a majority vote of the city council of said city, then the city treasurer of said city shall be instructed by the city council to invest said sinking fund, or part thereof, in the kind or kinds of securities determined upon by the said city council."

From the foregoing it will be seen that the cities are required to act by ordinance in some instances, while in others they are required to act by resolution. This shows that there is no general requirement that the city must in all cases act by ordinance.

We call attention particularly to Subdivision 81, of Section 1229, that the city in legislating to carry into effect the powers granted may pass all ordinances, rules and regulations, etc. Clearly the city is not restricted to ordinances. Again we find interpretation and recognition of the various forms of municipal legislation in Section 1214, of the Political Code, relating to the Initiative and Referendum:

§ 1214. "No laws, ordinances or resolution having the effect of law for the government of any city or town passed by the legislative body or bodies thereof, except such as are for the immediate preservation of the public peace, or the public health, or safety, or expenditure of money in the ordinary course of the administration of the affairs of such public corporation, shall go into effect until twenty days after the passage of such law, ordinance or resolution, and the words law, ordinance or resolution used in this article mean ordinances, resolves, orders, agreements, contracts, francises and any measure which it is in the power of the law makers or the electors of any municipality to enact."

Here is a plain and clear cut recognition of the power of a city *to enact resolution having the effect of law.*

IT IS IMMATERIAL WHETHER THE ACTION IS LABELED *"ORDINANCE"* OR *"RESOLUTION."*

"Where the resolution is passed with all the formalities of an ordinance, it thereby becomes a legislative act, and it is immaterial whether called an ordinance or resolution."

McQuillin Municipal Corporation, Vol. 2, p. 1395, Sec. 633.

In City of Alma v. Guaranty Sav. Bank, 8 C. C. A. 564 (reading from page 567), Judge Thayer says:

"The law is well settled that a municipal corporation may declare its will as to matters within the scope of its corporate powers, either by a resolution or an ordinance, unless its charter requires it to act by ordinance; and

generally it is of little significance whether a legislative measure is couched in the language of an ordinance or of a resolution, where it is enacted with the same formalities which usually attend the adoption of ordinances."

Appellant relies on Engstad v. Dinnie, 8 N. D. 1, 76 N. W. 292, but the case is not in point. What the Court holds in that case is that where a city is empowered to establish a light plant, it must first enact an ordinance auhorizing the plant and making provision for its maintenance and operation, before it can levy taxes for the construction, maintenance and opeation of the same.

In the case at bar the resolution was passed with all the formalities of an ordinance. It has all the attributes of an ordinance. There is no statute requiring the action to be by ordinance in the specific matter. The mere label of "Ordinance," or "Resolution," is not controlling.

"QUESTION OF JURISDICTION NOT CERTIFIED."

On this proposition we call attention to the following:

The decree is dated September 10, 1915, was entered September 14, 1915, and hence was entered during the April, 1915, term of the District Court. The decree is shown on pages 42, 43, 44, and 45 of the printed record and date of entry appears at foot of decree at top of page 45 of the record. The bill in this cause was filed in the Southern Division of the District Court for the District of South Dakota. (See title of bill page 2 of the record and filing endorsement of clerk on bill page 19 of the record.)

By section 106 of the Judicial Code of the United States, it is provided, "Terms of the District Court for the Southern District shall be held at Sioux Falls, on the first Tuesday in April and the third Tuesday in October."

The petition for appeal and assignments of error were filed on April 4, 1916, and were served on respondent's attorneys on April 15, 1916. (Record pages 145-146). The first Tuesday in April, 1916, was April 4, 1916, hence the petition and assignments of error were filed on the first day of the April, 1916, term of the District Court. The order allowing the appeal was entered April 15, 1916. (Record page 147).

The statement of the evidence was certified by the District Judge on May 6, 1916, and filed May 8, 1916. (Record page 131). The certificate of the District Judge to the testimony, (Record page 131), the petition for appeal (Record page 146), and the order allowing the appeal (Record page 147), show the appeal to be one taken generally from the decree and the record does not contain any certificate by

which the question of jurisdiction is certified to the Supreme Court.

Appellant also entirely ignores the claim made by the complainant in the Bill of Complaint under the "due process" clause of the Constitution.

IMPAIRMENT MAY BE BY RESOLUTION.

But the impairment may be by resolution is too well established to be open for discussion:

Northern Pac. Ry. v. Duluth, 208 U. S. 583.

Vicksburg v. Vicksburg Waterworks Co., 202 U. S. 453.

Iron Mountain Ry. v. City of Memphis, 96 Fed. 113, 37 C. C. A. 410.

A., T. & S. Ry. Co. v. Shawnee, 183 Fed. 85.

Appellant attempts to bring this case within the rule in St. Paul Gas Light Co. v. St. Paul, 181 U. S. 142; Dawson v. Columbia Trust Co., 197 U. S. 178; and Des Moines v. City Ry. Co., 214 U. S. 179.

In the St. Paul case the Court says, "No legislative act is shown to exist, from the enforcement of which an impairment of the obligations of the contract did or could result."

In the Dawson case the Court says, "There was no legislation subsequent to the contract."

In the Des Moines case the Court says, "We are of the opinion that this (the city resolution) is not a law impairing the rights alleged by appellee." "That the only menace to appellee was the direction to the city solicitor to bring suit to determine the rights of the parties."

The present case comes squarely within the rule announced in Owensbury v. Cumberland Tel. & Tel. Co., 230 U. S. 58. In that case the offending ordinance required the telephone company to remove its poles and wires from the streets within a reasonable time and upon failure to remove the mayor was directed to have them removed.

In the case at bar the ordinance or resolution terminates the rights of the company and declares the company shall have no right after May 11, 1913, to operate a telephone exchange and requires the company to forthwith on May 11, 1913, remove its property from the streets and in case of its failure to so remove the city council will secure the immediate removal of the same.

In A., T. & S. F. Ry. v. Shawnee, 183 Fed. 85, the Court of Appeals of the Eighth Circuit had occasion to distinguish that case from the Des Moines case. The Court says:

"It is contended by defendants that the case is controlled by City of Des Moines v. Railway, supra. In that

case all the parties were citizens of Iowa, and jurisdiction of the Circuit Court was invoked upon a federal question claimed to arise from the impairment, by a resolution of the municipal council, of its contract rights under an ordinance granting the use of the city streets for the operation of a street railway. It was also asserted that the resolution, if enforced, would take the property of the complainant without due process of law, contrary to the fourteenth amendment. The Supreme Court held the resolution was not a legislative act infringing the rights of complainant, but was a mere declaration by the city of its position in a controversy then going on, and a direction to its law officer to resort to the courts if its view was not accepted. The case was therefore dismissed for want of jurisdiction. In the case at bar jurisdiction is founded upon diversity of citizenship, but the question as to the character and effect of the resolution is nevertheless involved in the general equities of the case. The resolution instructed the mayor and city clerk to serve a written notice upon the company to open the street and put it in condition for travel within 30 days or steps would be taken by the city to compel it to do so. Embodied in the resolution was the form of the notice, as follows:

'You are hereby notified that by resolution passed by the mayor and council of the city of Shawnee, state of Oklahoma, on the 25th day of September, 1908, you must place the crossing of your right of way over and across Tenth street in the said City of Shawnee in good condition for travel by the general public within thirty days from the service of this notice upon you, or the mayor and council of said city of Shawnee will proceed as by law authorized to compel you to do so.'

We think this resolution is quite different from that in the Des Moines case, and that it is substantially like that held in Northern Pacific Ry. Co. v. Duluth, 208 U. S. 583, 28 Sup. Ct. 341, 52 L. Ed. 630, to impair the obligation of a prior contract. It is more than a mere declaration of the attitude of the city and a direction to its law officer to bring suit in court. It not only denies the company has any right or title to the street arising from a lawful vacation, but demands that it shall assume the burden of opening it up and restoring it to public travel. The resolution is militant, not merely declaratory. What steps the city would take if the company failed to comply are not expressed; but they may be inferred from the provisions of an Oklahoma statute which imposes upon every railroad company doing business in the state the duty

to construct and maintain in good condition for the use of the public the crossings at the intersection of its tracks and public highways, and prescribes a penalty of $25 per day for each day's negelect to do so after 30 days' written notice by the board of alderman of a city. Comp. Laws 1909, § 7498. According to well-settled principles, a court of equity has jurisdiction of such a case as this."

WAS THERE A CONTRACT TO BE IMPAIRED.

We contend that Ordinance No. 180, (Record page 72) was intended to and does grant a franchise for the establishment, maintenance and operation of a telephone exchange in the city of Mitchell for a period of twenty years from and after June 7, 1904.

Appellant contends that the ordinance is only a franchise for the use of the streets for the purposes of toll lines running into and through the city. The contention is based on the words, "Long Distance Telephone." It is our contention that the phrase, "Long Distance Telephone, or other electrical devices," relates entirely to the telephone instrument. That at that time the name, "Long Disance Telephone," was applied to the then latest improved telephone instrument.

Let us first see if there is anything in the ordinance indicating the setting of pole lines for toll purposes only. The ordinance provides that poles and wires may be placed on any of the streets, alleys and public highways, except Main, Park Avenue, Fourth and Fifth Streets. The poles and wires are to be located under the direction of a committee appointed by the city council. By section 3, the poles, wires and fixtures are to be so placed as not to interfere with travel and traffic on the streets, nor, with shade trees, nor, with the flow of water in the mains, sewers and gutters of the city. The right is reserved to the city for future regulation, not destructive however, to the rights and privileges herein granted. The city reserved the right to string wires on the poles for fire alarm purposes.

Upon quite a similar state of facts the Court of Appeals of the Eighth Circuit in the case of Vermillion v. N. W. Tel. Ex. Co., 189 Fed. 289, held that the grant was for an exchange. The Court speaking particularly about the fire alarm wires said:

"The resolution further provides, 'That the city of Vermillion may have the free use, if desired, of their poles for fire alarm and police wires.' This language clearly indicates that a local exchange was to be established. The use of the poles of a through line would have been of no advantage for the purpose of fire and police wires."

In fact every part of the ordinance, other than the phase, "Long Distance Telephone or other electric devices," indicates that an exchange was contemplated. What was meant by "Long Distance Telephone or other electrical devises." We have submitted testimony showing that at the time this franchise was granted there was an improved telephone instrument known to the telephone trade as, "Long Distance Telephone." That such telephone was one equipped with a transmitter capable of being used against greater resistances than the ordinary telephones theretofore used. This is not restricted to mere matter of distance. The resistance of distance is only one of the elements to be overcome. There are the interferences occasioned by high tension electric currents such as electric light and street car lines and many minor interferences, so that a given type of telephone that would be efficient for conversation over a distance of fifty miles in rural districts would not be efficient over a distance of five miles in our great cities. Hence an analysis of the testimony shows that the Long Distance Telephone was simply an instrument equipped with the most efficient transmitter. Again the language of the ordinance is plain, "By long distance telephone or other electrical devises." Suppose instead of long distance telephones, 'other electrical devises' had been installed. Would the use of such, 'other electrical devises,' have been controlled by 'long distance telephone.' The disjunctive, 'or', precludes such interpretation.

Suppose the ordinance had read, "by electrical devises,", there would be nothing whatever antagonistic to an interpretation in favor of an exchange. The record shows that the so-called, "Long Distance Phones," have been discarded and automatic telephones and systems installed, so that on March 17, 1913, when the resolution of ouster was passed the company was in fact using the "Other electrical devises." Is the situation any different than it would have been if the ordinance read, "electrical devises."

Another important feature is the following language in the ordinance, "For supplying the citizens of Mitchell and the public in general facilities to communicate * * *" with parties residing *IN*, near or at a distance from Mitchell. How could citizens of Mitchell talk with parties *IN* Mitchell over a long distance toll line. How could facilities for such intercommunication between people in Mitchell be supplied, except, through the medium of a telephone exchange.

Judge Booth in his decision of this case in the District Court has covered this branch of the case so completely that we quote that part of the decision:

"The title of the ordinance is as follows:

"An ordinance to grant permission to the Dakota Central Telephone Lines (Incorporated) their successors and assigns, to erect poles and fixtures, and to string wires for the purpose of operating a long distance telephone system, within and through the city of Mitchell, South Dakota.

"The words 'system,' 'within' and 'through' contained in said title are significant; and taken together would seem to indicate that something more was intended to be granted than a mere right to carry long distance telephone wires through the city. In section one of the ordinance is granted the right and privilege, 'to erect polies and string wires on any of the streets, alleys and public highways of the City of Mitchell,' excepting Main, Park Avenue and Fourth and Fifth Streets, this exception, however, not to prohibit the crossing of Main, Park Avenue and Fourth and Fifth Streets at right angles, where it is necessary.' This language of the ordinance is broad and comprehensive, and certainly capable of a construction broad enough to cover the erection and maintenance of a local exchange.

"Again, in the same section is the following language: 'for supplying the citizens of the City of Mitchell, and the public in general, facilities to communicate with parties residing in, near or at a distance from Mitchell.' The words 'in,' and 'near' are as important as the words, 'at a distance from,' and cannot be disregarded in construing the section in question. It would be unreasonable to suppose that a right was granted to the telephone company to erect and operate a telephone system by which a citizen of Michell living near the city limits could talk over the telephone line with a party living ten rods distant, but outside of the city limits, but that said citizen could not talk with another citizen within the city over the telephone line, though the last named party was distant many times as far as the person outside of the city limits. In order that the construction of the defendant may prevail, it would be necessary to practically eliminate the words, 'in' and 'near' from said section. But it is one of the cardinal rules of construction of ordinances that all words contained therein shall if possible be given full force and effect.

"The defendant, however, relies upon the expression, 'Long distance telephone' contained in said section, as indicating a purpose on the part of the city not to grant permission to the telephone company to maintain and operate under said ordinance a system whereby the citizens of Mitchell could communicate by telephone with each other. Much testimony has been introduced, without objection, on

the part of the respective parties to this suit, touching the meaning of the words 'long distance telephone.' The testimony of the various witnesses has developed the fact that the words in question had at the time of the passage of ordinance 180 several different and distinct meanings. According to the testimony of some of the witnesses, the words indicated telephone communication by improved or more powerful transmitters. According to others, telephone communication by solid back transmitters. According to the testimony of other witnesses, telephone communication by toll lines running between towns and cities at a considerable distance from each other. According to the testimony of still other witnesses, telephone communication by telephone having a common battery system as distinguished from a local battery system. In my opinion a fair conclusion from all the evidence in the case as to the meaning of the words, 'long distance telephone,' as used in Ordinance 180, is this: a telephone suitable and efficient for long distance use, and capable of being connected with and used in connection with wires running to distant points; and the meaning of said section is, that the telephone company was granted a franchise to furnish facilities of such character as to transmitters, receivers, poles, wires, switching devises and other necessary appliances, that the patrons of the company in the City of Mitchell could at their own homes or places of business communicate with others, whether in the city, near the city, or at a distance from the city. This construction, in my opinion, gives force and effect to all of the words of the grant, and does violence to none of the language therein contained."

IF THE CITY ONLY INTENDED TO GRANT A FRANCHISE FOR TOLL LINES INTO AND THROUGH THE CITY WHY WAS IT THAT ORDINANCE NO. 174, WAS NOT SUFFICIENT AND WHY WAS IT NECESSARY TO PASS ORDINANCE NO. 180.

Ordinance No. 174, and No. 180, appear in the record on pages 48 and 49. An examination of the two ordinances discloses two important distinctions between them.

The title of No. 174, reads, "For the purpose of operating long distance telephone lines."

The title of No. 180, reads, "For the purpose of operating a long distance telephone system."

Why the change from "Telephone Lines," to "Telephone System."

In section one, Ordinance No. 180, reads the same as No. 174, except, that the word, "*IN*" is inserted after the

words, "With parties residing." Why was this change made.

Again we quote from Judge Booth's decision:

"If we go outside of the language of the ordinance, and consider the circumstances leading up to and surrounding its passage, we are led to the same conclusion. At the time of the passage of the ordinance in 1904 a considerable percentage of the telephones in use in the City of Mitchell were equipped with an old style or type of transmitter, not capable of efficient service in long distance telephone work. Long distance facilities had become of great and growing importance. The telephone company in question was operating both long distance lines and local exchange lines in other parts of the state. Ordinance 174 had been passed in March, 1904, but had been disapproved by the Telephone Company, as unsatisfactory. A new ordinance, No. 180, was prepared and submitted for passage. Ordinance 180 was largely in the same terms as ordinance 174, but there were several noticeable changes. In the title of Ordinance 174 occur the words, 'for the purpose of operating long distance telephone lines within and through the City of Mitchell.' In the title of Ordinance 180 the above wording is changed so that it reads, 'for the purpose of operating a long distance telephone system within and through the city of Mitchell.' Further, the words 'In' was inserted between the word 'residing' and the word 'near,' where the same occur towards the end of section one; so that while ordinance 174 reads 'with parties residing near or at a distance from Mitchell,' ordinance 180 reads 'with parties residing in, near or at a distance from Mitchell.' These changes in the wording of the title and of this most important section of the ordinance are significant. The changes were made openly and advisedly. It cannot be believed that the changes were made without being discussed and fully understood by both parties interest.

"Counsel for the defendant suggests that it is improbable that the city council would pass an ordinance providing for a second local exchange when one was already in existence. To this it may be answered that section 5 of ordinance 135 provides, 'That no exclusive right or privilege is hereby granted to the said F. B. Elce, his associates, heirs and assigns,' thus recognizing the possibility at least of more than one local exchange. Further, the local exchange then existing in the city at the time of the passage of Ordinance 180 was not of the proper efficiency to form a part of a successful long distance system. The purchase of the local telephone system by the Dakota Central Tele-

phone Lines had not been completed, at the time of the passage of Ordinances 174 and 180. As events shaped themselves, however, the Dakota Central Telephone Lines, instead of erecting and maintaining new local telephone facilities, purchased and improved the existing ones.

"Counsel for the city further suggests that it is improbable that the city would have passed an ordinance which might result in taking away from the city the tax created under Ordinance 135. Here again it can be but of slight value to speculate as to the motives of the city in passing Ordinance 180. It may be observed, however, that there is no showing in the evidence in this case of any considerable amount of taxes received by the city under Ordinance 135 prior to the passage of Ordinance 180; nor is there any evidence that there was any assured or substantial basis for concluding that the revenue accruing under Ordinance 135 from a purely local telephone system disassociated from a long distance telephone system would ever be of any considerable amount.

"Counsel for defendant contends that the telephone company by paying taxes under Ordinance 135 subsequent to the passage of Ordinance 180, has placed a practical construction upon Ordinance 180, as not granting a franchise to operate a local telephone exchange. While this suggestion is not without weight, it is by no means conclusive. It is not necessary to speculate upon the reasons why the telephone company continued to operate and pay taxes under Ordinance 135 after the passage of Ordinance 180. There may have been many and sufficient reasons. It is apparent upon the face of the two ordinances that greater street rights are granted under Ordinance 135 than under Ordinance 180. This of itself may have been sufficient.

"Finally, counsel for the city suggests that the negotiations entered into between the telephone company and the city in 1912 looking towards the passage of a new ordinance, tend strongly to show that the telephone company did not at that time claim any right under Ordinance 180 to maintain a local telephone exchange. Such negotiations can have but little weight in determining the questions in controversy here. The proposed new ordinance was not introduced in evidence, and its terms are not disclosed. It might very well be that the telephone company was willing to negotiate for a new ordinance looking to the acquirement of still greater rights and privileges than those which is already had under Ordinance 180, and to continue perhaps for a longer time.

"The conclusion therefore is that Ordinance 180 did, as a integral part of the long distance telephone system franchise therein granted, grant also the privilege or franchise to maintain and operate a local telephone exchange, the subscribers of the telephone company using the same local transmitters in sending their long distance messages." Record pages 60 and 61.

Again it will be noted that on April 10, 1907, a resolution was passed granting the company the right, "To place, construct and maintain through and under the streets, alleys and public grounds of said city, all conduits, manholes and cables proper and necessary for supplying to the citizens of said city and the public in general communication by telephone and other improved appliances." See paragraph VII, page 73 of the printed record.

It is alleged that relying on this resolution the company proceeded to put its wires under ground and prepare for the installation of an automatic exchange. Paragraph X ,of Bill of Complaint, Record page 9.

The company constructed a fire proof building in which to install and maintain its exchange. The work began in 1907, was carried on continuously and finally completed in 1912. The work progressed slowly because of the continuous operation of the exchange and the work necessarily had to be done in such manner as not to interfere with the operation of the exchange.

We think that if the company had no other rights the resolution of April 10, 1907, is amply sufficient to satisfy the constitutional requirement that no telephone line shall be constructed in any city without the consent of the local authorities.

"No particular mode of manifesting municipal consent to the construction of a telephone line is prescribed by the consitution or statutes. So far as the Constitution is concerned such consent may be either express or implied." Telephone Co. v. City of Mitchell, 22 S. D. 191 (Reading from page 198.)

How can it be said that the city did not consent by its resolution of April 10, 1907, to the construction of the expensive underground work, not for a simple toll line running into and through the city, but ramifying all the streets and alleys necessary for an exchange. It will not work any hardship on the city to hold that the constitutional consent is limited to construction and does not extend to maintenance and operation because the operations of the telephone companies as to rates and general management are under the direct control of the State Railroad Commission, while the

city under its police power can fully protect itself against unreasonable occupancy of the streets.

A number of courts have held that consent to construction does not include consent to operation and maintainance:

Telephone Co. v. Minneapolis, 86 N. W. 69.
Abbott v. City of Duluth, 104 Fed. 833.
Duluth v. Tel. Co., 87 N. W. 1127.
State v. Flad, 23 Mo. App. 185.
Telephone Co. v. Red Lodge, 76 Pac. 758.
Irwin v. Telephone Co., 37 La. 633.
Hodges v. Western Union, 29 L. R. A. 770.
Farmer & Gets v. Tel. Co., 74 N. E. 1078.
Chamberlain v. Tel. Co., 93 N. W. 596.
Tel. Co. v. Sheboygan, 90 N. W. 441.
State v. Mil. Ind. Tel. Co., 114 N. W. 108.
Pittsburg Appeal, 115 Penn. 4.
State v. Mayor, 49 N. J. Law, 303.

Appellee relies upon the Ordinance No. 180, and the resolution of April 10, 1907, as expressing the consent of the city to the construction of the telephone exchange in the City of Mitchell. That while the consent may be predicated upon certain conditions, such as the payment of a gross earnings tax, yet, the consent itself cannot be limited or revoked.

RES JUDICATA.

ESTOPPEL IN FEDERAL COURT BY REASON OF DECISION OF STATE COURT.

Appellant contends that the scope and meaning of Ordinance No. 180, has been determined by the Supreme Court of South Dakota, and it is therefore no longer an open question.

There are three reasons why this is not true:

First. The suit is not on the same claim or demand involved in the prior decision.

Second. The particular point was not involved.

Third. In determining whether there is a contract to be impaired and interpreting such contract the Federal Courts are not bound by the decisions of the State Courts.

The case of City of Mitchell v. Dakota Central Telephone Company, 25 S. D. 409, was a suit to collect the gross earnings tax imposed by Ordinance No. 135. (Elec Ordinance). The company defendants on the ground that the city was without power to impose such condition in a franchise ordinance and the precise question as to the interpretation of Ordinance No. 180, was not necessarily involved in the suit. While it is true that the ordinance is referred to in the opinion as a franchise for toll lines, yet, that question was

not in fact litigated in the suit nor, was its decision necessary to a determination of the question of the right of the city to recover the gross earnings tax. The interpretation of Ordinance No. 180 was only collaterally involved and referred to in the opinion of the Court as a matter of argument.

The present action is upon a different claim or demand than the one involved in the case of City of Mitchell v. Dakota Central Telephone Company, 25 S. D. 409.

The difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand and its effect as an estoppel in another action between the same parties upon a different claim or cause of action, is thus stated by Mr. Justice Field, in Cromwell v. Sac County, 94 U. S. 351, 24 L. Ed. 195.

"In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defenses actually existed, of which no proof was offered, such as forgery, want of consideration or payment. If such defenses were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defenses never existed. The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy. Such demand, or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law, upon any ground whatever.

But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be

as to the point or question actually litigated and determined in the original action; not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

To the same effect:

Russell v. Place, 94 U. S. 606, 24 L. Ed. 214.
Davis v. Brown, 94 U. S. 423, 24 L. Ed. 204.

See also:

Carter v. Carter (N. D.) 103 N. W. 425.
Herman on Estoppel, Sec. 274.

The rule as stated has been adopted by Supreme Court of South Dakota. Pitts v. Oliver, 13 S. D. 566.

It has been settled by a long line of decisions that regardless of the opinions and decisions of State Courts the Federal Courts will in cases involving State law impairing obligations of contracts, exercise an independent judgment in determining as to the existence of a contract and the proper construction to be placed upon it:

"In the case of Mobile & Ohio R. Co. v. Tennessee, 153 U. S. 486, the Court in its opinion, speaking in reference to this question said: 'It is well settled that the decision of a state court holding that, vision does not constitute a contract, is not binding on this court. The question of the existence or non-existence of a contract in cases like the present is one which this court will determine for itself, the established rule being that where the judgment of the highest court of a state, by its terms or necessary operation, gives effect to some provisions of the state law which is claimed by the unsuccessful party to impair the contract set out and relied on, this court has jurisdiction to determine the question whether such a contract exists as claimed, and whether the state law complained of impairs its obligation.'

"In the case of Mercantile Trust Co. v. City of Columbus, 203 U. S. 311, the court in its opinion used the following language: 'It is part of the duty of the Federal courts, under the impairment of the obligation of contract clause in the Constitution, to decide whether there be a valid contract and what its construction is, and whether, as construed, there is any subsequent legislation, by municipality or by the state legislature, which impairs its obligation.'

And again in the same opinion: "It cannot be determined that there is an impairment of the obligation of a contract until it is determined what the contract is, and whether it is a valid contract. If it be valid, it still remains to be

determined whether the subsequent proceedings of the city council and legislature impaired its obligation."

In the case of Perry Co. v. Norfolk, 220 U. S. 472, Court said in its opinion, on page 479: "This court, therefore, has power, in order to determine whether any contract has been impaired, to decide for itself what the true construction of the contract is."

The same rule is recognized in the late case of Milwaukee Electric Light Co. v. R. R. Comm. of Wisconsin, in an opinion handed down June 14, 1915, the Court using the following language: "It is true that this Court has repeatedly held that the discharge of the duy imposed upon it by the Constitution to make effectual the provision that no state shall pass any law impairing the obligation of a contract, requires this court to determine for itself whether there is a contract, and the extent of its binding obligation, and parties are not concluded in these respects by the determination and decisions of the Courts of the states. While this is so, it has been frequently held that where a statute of a state is alleged to create or authorize a contract inviolable by subsequent legislation of the state, in determining its meaning such consideration is given to the decisions of the highest court of the state."

"In an action to vacate the charter of a railroad company because a majority interest therein had been purchased by a competing line, which purchase was alleged to be ultra vires, the bill alleged that such holding by the latter company was ultra vires because the Georgia Constitution forbade the Legislature to grant such power to any corporation where its effect might be to lesson or destroy competition. The petition for removal claimed that this impaired the obligation of the contract embodied in the company's charter, which was granted before this provision of the Constitution took effect, *Held*, that this also presented a federal question, although the Supreme Court of Georgia had theretofore decided that the charter did not confer the right claimed.—State v. Port Royal & A. Ry. Co., 56 Fed. 333."

"In a suit in a federal court raising the question whether the state was attempting to impair the obligation of a contract, a decision that this question was res judicata as against the state does not oust the federal jurisdiction, on the theory that it makes the case turn on a question not federal.—Bank v. Stone, 88 Fed. 383."

In Owensboro v. Cumberlaind Tel. & Tel. Co., 230 U. S. 58, we find a situation quite similar to the case at bar. The plea of adjudication by state court was overruled.

"ADMISSIBILITY OF EVIDENCE."

Appellant contends that the testimony of the persons who were alderman and mayor of the city at the time Ordinance No. 180, was enacted as to what they intended should have been received.

The precise question was before the U. S. Court of Appeals, Eighth Circuit, in City of Vermillion v. N. W. Tel. Ex. Co., 189 Fed. 289. The Court said, "But the meaning of municipal ordinances, like other legislative acts, must be ascertained from their language."

We submit that the decree should be affirmed.

Respectfully submitted,

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MAX ROYHL,
Counsel for Appellee.